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mon knowledge that the crime of attempted rape is well-nigh, if not altogether, as heinous as the consummated offense of rape, and that public indignation is as much aroused by the one offense as the other, where the full accomplishment of the criminal purpose is thwarted only by some extraneous circumstance, and that, unless there is a prompt conviction and a severe penalty imposed, a lynching is liable to result.

**9. Criminal Law (§ 577\*)—Accused Held Given Reasonable Opportunity to Employ Counsel.**—In prosecution for rape, where no motion was made for a continuance of the case, and there was a hung jury on a first trial, held that accused was given reasonable opportunity to employ counsel and prepare for trial, the same counsel representing accused on both trials.

**10. Rape (§ 53 (1\*))—Verdict for Attempted Rape Held Not Contrary to Evidence.**—In prosecution for rape, a verdict of guilt of attempted rape held not contrary to the evidence.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 629.]

Error to Circuit Court, Augusta County.

Henry Hart was convicted of an attempt to rape, and brings error. Affirmed.

*Carter Braxton and Curry & Curry*, all of Staunton, for plain-in error.

*John R. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen., and Leon M. Bazile, Second Asst. Atty. Gen.*, for the Commonwealth.

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#### SNARR v. COMMONWEALTH.

Nov. 17, 1921.

[109 S. E. 590.]

**1. Criminal Law (§ 365 (2\*))—Testimony as to Defendant's Arrest for Driving Automobile While Intoxicated, in Prosecution for Transporting Liquor, Held Admissible.**—In prosecution for unlawful transportation of liquor following discovery of liquor in defendant's possession after being arrested for driving automobile while intoxicated, testimony as to his arrest on such other charge held admissible as against contention that it related to another offense, being part of the *res gestæ*.

**2. Criminal Law (§ 899\*)—Defendant Waived Objection to Testimony as to Certain Facts by Testifying and by Cross-Examining Witnesses as to Such Facts.**—In prosecution for unlawful transportation of intoxicating liquors, defendant, having cross-examined witnesses for state as to his arrest on the charge of driving automobile while intoxicated and circumstances preceding arrest, and having him-

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

self fully testified as to such facts, could not complain of the admission of testimony as to such facts, having waived objections thereto.

**3. Intoxicating Liquors (§ 138\*)—Carried by Automobile Driver in Pocket of Coat Not Carried in His "Baggage" within Prohibition Act.**—Prohibition Act, § 39, permitting traveler to carry certain amount of liquor in his "baggage," did not permit automobile driver to carry whisky bottle in coat being worn by him, such liquor being carried on his person, and not in his "baggage," within the statute.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Baggage.]

**4. Intoxicating Liquors (§ 131\*)—Transportation of Liquor Unlawful, Though Not for Purpose of Sale.**—Under Acts 1918, c. 388, § 3, making it unlawful "to manufacture, transport, sell, keep or store for sale" the transportation of liquor is unlawful, regardless of whether it is transported for the purpose of sale, since the words "for sale" merely qualify the preceding words "keep or store," and not the words "manufacture" and "transport."

**5. Criminal Law (§§ 419, 420 (10), 1169 (12)\*)—Witnesses (§ 246 (1)\*)—Testimony on Court's Examination that Witness Had Heard Defendant Had Driven Automobile While Intoxicated Held Hearsay and Reversible Error.**—In prosecution of a physician of good reputation for unlawful transportation of liquor, in which defendant disclaimed having intentionally violated the law and asked for instruction precluding a jail sentence under Acts 1918, c. 388, § 5, court's examination of witness as to whether witness had heard, prior to the transaction leading to defendant's arrest, that defendant had operated automobile while under the influence of liquor, and answer of witness that he had so heard, held irrelevant, hearsay, and prejudicial error on appeal from judgment based on verdict fixing punishment as confinement in jail.

**6. Criminal Law (§ 369 (6)\*)—Statute Precluding Imposition of Jail Sentence in Event of Unintentional Violation Does Not Justify Admission of Evidence of Other Offenses.**—Acts 1918, c. 388, § 5, providing that, if it shall appear to the court in the prosecution for a violation of the prohibition act that there has been no intentional violation, the court shall instruct the jury not to impose a jail sentence, did not authorize the court in prosecution for unlawful transportation of liquor to make inquiries as to other possible offenses by defendant in violation of prohibition law, but merely relates to the punishment to be inflicted in case it appeared that the violation of a particular charge was unintentional after a trial under the same rules of evidence and according to the same methods of practice and procedure as in other criminal cases.

**7. Criminal Law (§ 1152 (1)\*)—Exercise of Discretion Not Re-**

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

**viewed unless Abused or unless Ruling Was Based on Irregular and Inadmissible Evidence.**—In prosecution for violation of the prohibition act, refusal to charge jury not to impose jail sentence under Acts 1918, c. 388, § 5, requiring court to so charge, if it shall appear that the violation of the statute was not intentional, will not be reviewed on appeal except in case of clear abuse of discretion or where based upon irregular and inadmissible evidence.

**8. Intoxicating Liquors (§ 242½\*)**—**New, vol. 13A Key-No. Series—Requiring Reputable Physician to Execute Bond against Violation of Prohibition Act on Conviction of Transportation of Liquor Held Improper.**—In prosecution for transportation of liquor, in which defendant was a physician of good reputation and of high standing, and claimed the violation of the statute to have been unintentional, action of court in requiring defendant to execute a bond conditioned that he would not violate the prohibition act for the term of one year under Acts 1918, c. 388, § 43, held improper in absence of evidence that defendant was likely to again violate the act.

Error to Circuit Court, Rockingham County.

S. S. Snarr was convicted of unlawful transportation of intoxicating liquor, and he brings error. Reversed and remanded, with directions.

*E. D. Ott*, of Harrisonburg, and *M. L. Walton*, of Woodstock, for plaintiff in error.

*John R. Saunders*, *Atty. Gen.*, *J. D. Hank, Jr.*, *Asst. Atty. Gen.*, and *Leon M. Bazile*, *Second Asst. Atty. Gen.*, for the Commonwealth.

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VIRGINIA HOT SPRINGS CO. *v.* SCHRECK.

Nov. 17, 1921.

[109 S. E. 595.]

**1. Appeal and Error (§ 914 (1)\*)**—**Notice of Proceeding by Motion for Judgment Assumed Returned in Prescribed Time.**—Notice of proceeding by motion for judgment will be assumed to have been returned to the clerk's office within five days after service, as prescribed by Code 1919, § 6046; the date of service not appearing from the record, and no objection being made on this account.

**2. Judgment (§ 184\*)**—**Notice of Proceeding by Motion for Judgment Must Be Returnable within 90 Days from Date.**—By analogy to Code 1919, § 6055, requiring "process from any court" to be returnable within 90 days after its date, the notice which section 6046 requires for commencing a proceeding by motion for judgment without

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.